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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CASTLETON REAL ESTATE & DEVELOPMENT, INC., Plaintiff and Respondent, v. TAI-FU CALIFORNIA PARTNERSHIP et al., Defendants, Cross-defendants and Appellants; YK AMERICA GROUP, INC., Cross-complainant and Respondent.	G043720 (Super. Ct. No. 07CC00624) O P I N I O N
CASTLETON REAL ESTATE & DEVELOPMENT, INC., Plaintiff and Appellant, v. TAI-FU CALIFORNIA PARTNERSHIP et al., Defendants and Respondents.	G043760 (Super. Ct. No. 07CC00624)
YK AMERICA GROUP, INC., Cross-complainant and Appellant, v. TAI-FU CALIFORNIA PARTNERSHIP et al., Cross-defendants and Respondents.	G043787 (Super. Ct. No. 07CC00624)

Appeals from a judgment and an order of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Judgment affirmed. Order affirmed in part and reversed and remanded in part.

Law Offices of Kenny Tan, Kenny Kean Tan; Castro & Associates, Joel B. Castro, J. Alan Warfield, Toneata Martocchio; Law Office of Morton Minikes and Morton Minikes for Defendants, Cross-defendants, Appellants and Respondents Tai-Fu California Partnership et al.

Law Offices of John A. Tkach and John A. Tkach for Plaintiff, Respondent and Appellant Castleton Real Estate & Development, Inc.

Law Offices of Tony M. Lu and Tony M. Lu for Cross-complainant, Respondent and Appellant YK America Group, Inc.

* * *

Plaintiff Castleton Real Estate & Development, Inc. (Castleton) sued defendants Tai-Fu California Partnership and Hsiuh Chin Lin (collectively Tai-Fu) to recover a real estate broker's commission under an exclusive listing agreement for the sale of certain real property. Tai-Fu cross-complained against Castleton and YK America Group, Inc. (YK) for rescission, indemnity, contribution, declaratory relief, and numerous torts. (Tai-Fu's cross-complaint is not at issue on appeal.)

YK, in turn, cross-complained against Tai-Fu for breach of an oral contract to pay two percent compensation for services rendered upon the sale of the subject real property. In addition to a common count for money paid, YK also alleged causes of action for promissory estoppel, promissory fraud, quantum meruit, and unjust enrichment.

Following a three-week trial, a jury awarded Castleton $1.5 million on its breach of contract claim based on an offer made by a ready, willing, and able buyer and the "'sale'" of the property during the listing period. It also found in YK's favor on its

cross-complaint against Tai-Fu for breach of contract and promissory fraud, awarding damages in the amount of $400,000.

The court denied Tai-Fu's posttrial motions and Castleton's and YK's motions for prejudgment interest. It also vacated that portion of the special verdict entitling Castleton to a commission based on a sale of the property by Tai-Fu but upheld the damages awarded, concluding substantial evidence supported the jury's finding there was a ready and willing buyer. It further found YK could not recover for quantum meruit or promissory fraud, having prevailed on its breach of oral contract claim, which was supported by substantial evidence.

Tai-Fu appeals, contending Castleton was not entitled to recover a commission because the listing agreement was illegal and subject to the doctrine of unclean hands, the offers on the property were materially different from the listing agreement, and the buyer was not able to purchase the property without the financial assistance of third parties who had not committed. As to YK, Tai-Fu argues recovery under the oral agreement was improper in that one of its conditions never occurred and it was uncertain how the two percent was to be calculated.

Castleton and YK cross-appeal from the court's order denying their motions for prejudgment interest. We consolidated the appeals. In a related appeal (G044304), Castleton and two of its employees challenge the denial of their motion for attorney fees incurred in defending against Tai-Fu's cross-complaint.

We reject Tai-Fu's contentions on appeal and conclude Castleton, but not YK, is entitled to prejudgment interest. The order denying Castleton's motion for prejudgment interest is reversed and the matter remanded to the trial court to determine the appropriate amount to which it is entitled consistent with the views expressed in this opinion. In all other respects, the judgment is affirmed.

FACTS

Tai-Fu, a general partnership of which George Lin and his wife Sharon Lin were the majority interest holders (73 percent) and managing partners, owned 431 acres of vacant land next to the Morongo Casino in Cabazon (property). YK is a real estate development company. From 1998 to 2000, YK worked with Tai-Fu to develop or sell the property. When neither occurred, Tai-Fu thanked YK and promised to make it a future joint development partner or compensate it when the property was sold.

In 2002, Tai-Fu again approached YK about possibly developing the property. From that time until 2004, YK researched the market and prepared construction budget plans and sales projections, expecting to become a partner in joint development. It drafted several joint development contracts based on the parties' oral agreements, but Tai-Fu did not sign any of them, though it expressed gratitude and promised to compensate YK for the work.

In 2004, Tai-Fu's minority partners sued the Lins for improperly managing the property, with the main contention being their refusal to develop or sell the property. The Lins asked YK to mediate the lawsuit and an agreement was entered giving YK the exclusive right to represent Tai-Fu regarding the development of the property. In January 2006, the agreement was amended to provide for a separate contract whereby Castleton would be appointed the exclusive listing agent for the sale of the property. Tai-Fu then signed an exclusive listing agreement with Castleton, offering the sale of the property for $25 million and providing for a six percent commission.

Castleton is owned by Justin Huang, the son-in-law of YK's president, David Lu. Both companies operate from the same location, share personnel and office equipment, and have a common website jointly advertising real estate development and brokerage services. Neither YK nor its president Lu is a licensed real estate broker or agent, although both Huang and Castleton are.

During the listing period, Castleton received two full price, all cash offers on the property from a company called Overton Moore. The first offer, made March 2, 2006, was a resubmission of an offer made by Overton Moore the year before, which had expired in November 2005. Although the second offer submitted on March 16 was for $26 million, Huang testified the commission claim is capped at $1.5 million, as that is six percent of the listing price. Tai-Fu never responded to the offers.

In March 2006, Tai-Fu orally agreed to compensate YK a fee of two percent of the sales price of the property for all services rendered since 1998, plus its assistance in mediating the dispute between the partners and in the sale and development of the property. YK prepared a written agreement but Tai-Fu refused to sign it, telling YK to "rest assured" it would pay it the two percent.

Three months later, the minority partners sold their interest in Tai-Fu to Phillips Development Company, which then assigned its rights to Cabazon Partners. The partnership lawsuit was settled towards the end of the year, with the Lins being given an option to purchase the minority partners' interest by November 2006 or be bought out by the minority partners. When the Lins were unable to come up with the necessary funds, their interest in the property was sold to the minority partners, who in turn, transferred all partnership interest to Cabazon Partners. Upon receiving payment, Cabazon Partners sold the property to the Morongo Indians.

DISCUSSION

1. Tai-Fu's Appeal (G043720)

a. Legality of Listing Agreement and Unclean Hands

Tai-Fu argues the listing agreement with Castleton is void and unenforceable because it was illegally solicited, negotiated and procured by Lu, YK's president, who was not licensed as a broker, rather than by Castleton. Castleton responds

the issue has been forfeited by Tai-Fu's failure to argue to the jury any of the statutes it cites in its opening brief. But illegality generally can be raised at any time, including for the first time on appeal. (*Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1103.) Even so, Tai-Fu's contention lacks merit.

It is illegal to act as a real estate broker without a license. (Bus. & Prof. Code, § 10130.) The definition of a real estate broker includes one "who, for a compensation or in expectation of a compensation . . . does or negotiates to do one or more of the following acts for another or others: [¶] (a) . . . solicits or obtains listings of . . . real property . . . ." (Bus. & Prof. Code, § 10131, subd. (a).) Although Tai-Fu claims the record shows Lu solicited, procured, and negotiated various terms, it identifies no evidence he was or expected to be compensated for that work. (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 204 [person must be acting for payment to be a broker].)

In re Guardianship of Prieto's Estate (1966) 243 Cal.App.2d 79, on which Tai-Fu relies, is inapposite because in that case no evidence established either of the respondents asserting entitlement to a real estate commission was a licensed real estate broker yet both claimed the right to half of the commission, invalidating the transaction as an illegal joint effort. (*Id*. at p. 86.) Here, in contrast, Tai-Fu has not shown Lu sought or received any part of the broker's commission resulting from the listing agreement.

YK failed to establish the listing agreement is void due to illegality. Thus, we need not address its argument about unclean hands, which is based on the same theory.

b. Material Difference Between Offer and Listing Agreement

Tai-Fu contends the terms of the offers from Overton Moore materially differed as a matter of law from those in the listing agreement, precluding Castleton's entitlement to a commission. Castleton counters this is a factual determination and Tai-Fu is estopped from claiming it is one of law, having agreed to submit it to the jury. (See *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166.) According to

Castleton, the testimony of its expert Alan Wallace that the offers to pay the full amount requested in cash "mirror[ed] the key terms of the listing" based on the "custom and practice in the industry" constitutes substantial evidence there was no material difference between the offers and the listing.

Tai-Fu maintains a de novo review standard applies because the contents of the listing agreement and the Overton Moore offers were undisputed and Wallace merely compared the two documents without reference to extrinsic evidence. We agree, given the lack of conflicting extrinsic evidence (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865), but nevertheless reject Tai-Fu's contention.

Tai-Fu waived any material distinction between the offers and the listing agreement by failing to assert that as a basis for rejecting the offers. (*Kaufmann v. Nilan* (1962) 207 Cal.App.2d 1, 4.) Although an offer must be unconditional, if a condition is proposed and the seller fails to object to it but merely refuses to sell, the seller forfeits the right to refuse a broker's claim for a commission as to matters that could have been addressed had they been pointed out. (*Martin v. Culver Enterprises, Inc.* (1966) 239 Cal.App.2d 925, 929.) Under those circumstances, "'such difference will be deemed assented to, and the broker will be entitled to his commission.' [Citations.]" (*Kaufman v. Nilan, supra*, 207 Cal.App.2d at p. 4.) That is the case here. Rather than objecting to the purported conditions it now cites on appeal, Tai-Fu simply never responded to the offer.

Moreover, an offer from a prospective purchaser need only be "in substantial compliance with the terms of a listing" (*Lathrop v. Gauger* (1954) 127 Cal.App.2d 754, 767; see also *Kaufman v. Nilan, supra*, 207 Cal.App.2d at p. 4) and may include terms that "would be supplied by law if not specifically set forth in the agreement" and "items which are generally found in instruments of this kind" (*Showers v. Rober* (1928) 92 Cal.App. 171, 175). The offers in this case were presented on form purchase and sale agreements and, according to Wallace, the due diligence clauses contested by Tai-Fu are typical to such contracts.

And contrary to Tai-Fu's claim, the need for due diligence investigation and studies did not provide Overton Moore with the unilateral right to walk away from the transaction. Its right to cancel was limited in time, restricted to a basis related to the inspection, and subject to the requirement of reasonableness. "Contracts making the duty of performance of one of the parties conditional upon his 'satisfaction' are upheld on the theory that the expression of dissatisfaction must be genuine and not arbitrary, and that an objective criterion[]—good faith—controls the exercise of the right to determine satisfaction. [Citations.]" (*Rodriguez v. Barnett* (1959) 52 Cal.2d 154, 160.) Here, Overton Moore officers testified they made the offers in good faith and intended to follow through on them following a due diligence investigation. No contrary evidence exists.

c. Buyer's Ability to Purchase Property

Tai-Fu asserts Castleton was not entitled to a commission because it failed to show Overton Moore had the financial ability to purchase the property. We disagree.

Whether a buyer is able to perform is a question of fact to which we apply the substantial evidence test, viewing all evidence and inferences in the light most favorable to the judgment. (*Henry v. Sharma* (1984) 154 Cal.App.3d 665, 670.) To earn a commission, a broker must produce a buyer who is "'ready, willing and able to purchase the property on the terms stated in the listing agreement . . . ." (*Steve Schmidt & Co. v. Berry* (1986) 183 Cal.App.3d 1299, 1306.) The broker must present prima facie evidence the buyer has the ability to purchase, meaning the financial capacity to consummate the transaction. (*Id*. at pp. 1307-1308.) A buyer's testimony he or she is financially able to buy the property satisfies this burden. (*Id*. at pp. 1308, 1309; see also *Martin v. Culver Enterprises, Inc*., *supra,* 239 Cal.App.2d at p. 930 [testimony from one witness such as buyer's officer or principal sufficient to establish buyer's ability to perform].)

In *Steve Schmidt & Co*., the buyer submitted a declaration that as a professional investor and manager of real estate he had purchased many properties the size

of or larger than the one at issue and "'was and [is] fully able to complete the purchase as set forth in the listing agreement.'" (*Steve Schmidt & Co. v. Berry*, *supra*, 183 Cal.App.3d at p. 1308.) His attorney also attested that having worked with the buyer for over three years in buying several large properties, he was "'aware [the buyer] has and continues to have the ability to purchase the . . . property on the terms set forth in the listing agreement.'" (*Ibid*.)

Similarly, here, Stanley Moore, the CEO of Overton Moore, testified to his 48 years of experience in the development industry and that his company, founded in 1972, would have been capable of coming up with $26 or $27 million had the sale proceeded. Overton Moore generally supplies 5 to 10 percent of the equity, with investors, including major pension funds and banks, providing the balance. The company at that time had assets exceeding $300 million with one particular pension fund, with which it had an active partnership since 2006. Moore did not believe it would be challenging to raise over $20 million. Under *Steve Schmidt & Co*., this was sufficient prima facie evidence Overton Moore commanded the necessary financial ability to shift the burden to Tai-Fu to overcome such a showing.

Tai-Fu claims it did so because Timur Tecimer, the president and COO of Overton Moore, testified the company did not "have $25 million to write a check" and would need to locate financial partners and develop an investment package. But Tecimer also testified the company had numerous sources of funding it could approach to present opportunities and close deals.

While acknowledging Overton Moore's "cadre of investors," Tai-Fu maintains it was speculative whether any of them would have viewed the purchase favorably and committed to investing millions of dollars, bringing the case within the rule that a prospective buyer relying on third party finances is not deemed financially able unless the third party makes a legally enforceable commitment. Tai-Fu cites *Pellaton v. Brunski* (1924) 69 Cal.App. 301 and *Abbott v. Floyd* (1934) 136 Cal.App.3d 365, both of

which rely primarily on the third case referenced by Tai-Fu, *Merzoian v. Kludjian* (1920) 183 Cal. 422.

Merzoian stated the general rule that financial ability may be shown by evidence the buyer "commanded resources upon which he could obtain the requisite credit" but that "unenforceable promises" were insufficient. (*Merzoian v. Kludjian, supra*, 183 Cal. at p. 430.) It did not, however, hold the ability to purchase may only be established by the obtaining of a binding loan agreement. (*Henry v. Sharma, supra*, 154 Cal.App.3d at p. 672.) Rather, it "'may be proved by showing the purchaser had liquid assets, property which could be sold and the proceeds used as collateral for a loan, or an actual loan commitment . . . .' [Citation.]" (*Id.* at p. 671.) In other words, the "proof needed to show ability depends on all the surrounding circumstances," not the existence of a legally enforceable loan agreement. (*Id.* at p. 672; see also *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1716 ["buyer is not necessarily unable to obtain a loan merely because he does not have a legally enforceable loan contract"].)

Henry saw "no purpose in requiring the buyers to bind themselves to a loan for which they have no immediate need" given the seller's anticipatory breach, and "question[ed] whether a lender would make a firm commitment to loan money for the purchase of property the present owner refuses to sell." (*Henry v. Sharma, supra*, 154 Cal.App.3d at p. 672.) The Supreme Court recognized this logic back in 1927 when it held that although the legal principles set forth in *Merzoian* "were correct as applicable to the facts of that case," requiring a buyer to demonstrate funds in hand or the consummation of a loan in order to prove the ability to comply with a purchase agreement before it was executed "would be to lay down too drastic a rule governing" prospective purchases of property. (*Russell v. Ramm* (1927) 200 Cal. 348, 353.)

Under the above authorities, substantial evidence supports the jury's factual determination Overton Moore was financially able to purchase the property. Although specific financial partners had not been located and an investment package had yet to be

developed, the jury could have reasonably inferred the company would be able to do so based on its past history with numerous investors, as well as its current assets of over $300 million with one pension fund. In contrast to *Merzoian*, where the defendant affirmatively established during trial the purchaser did not have the money, property, or credit to enable him to complete the purchase and that the promise to help him was an empty one, Tai-Fu failed to rebut Castleton's showing of financial ability.

d. Breach of Oral Contract with YK

For the first time on appeal, Tai-Fu contests the enforceability of the March 2006 oral agreement for payment of two percent on the grounds it was: (1) conditioned on Tai-Fu's sale of the property at the close of escrow, which did not occur; and (2) uncertain because it did not specify the particular sale transaction from which to calculate the two percent, as shown by YK's closing argument offering three possible alternatives from which to make the calculation. We agree with YK the first issue has been forfeited, having not been raised in the trial court. Tai-Fu distinguishes the case cited by YK, *Julian v. Hartford Underwriters Ins. Co*. (2005) 35 Cal.4th 747, 761, fn. 4 as involving an issue raised for the first time in the reply brief, yet "'[i]t is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal' [citation]" (*Martinez v. Scott Specialty Gases, Inc*. (2000) 83 Cal.App.4th 1236, 1249).

Tai-Fu concedes there was a two percent oral agreement for purposes of the appeal and that its challenge in the trial court was limited to disputing its existence. But it claims it may argue its unenforceability on appeal because Lu testified the oral contract "replaced and mirrored" an unsigned written agreement conditioning the two percent payment on the property being sold by Tai-Fu. Tai-Fu asserts it never sold the property because its majority shareholder (the Lins) sold their interests to the minority partners, who then conveyed those interests to Cabazon Partners, an entity separate and distinct from Tai-Fu, which then sold it to the Morongo Indians.

Under the unsigned written agreement, gross profit for the calculation of compensation was "defined as the final sales price between Tai-Fu and the purchaser of the Cabazon Property . . . ." The jury, however, was asked to determine only if the oral agreement existed and was breached, not whether it included all of the terms of the unsigned written agreement. Additionally, contrary to Tai-Fu's assertion, Lu did not testify the oral and unsigned written agreements were identical. Rather, the portions of the record cited by Tai-Fu show that although Lu testified the oral contract was premised on the unsigned version, which states Tai-Fu would pay two "percent of the gross sales price," Lu did not mention the condition raised on appeal that the sale had to be made by Tai-Fu. According to Lu, Tai-Fu agreed to pay him "[o]nce the property is sold" and the two percent was to calculated be from "the final sale price to be paid upon the sale of the Cabazon property . . . ." Because the jury could have reasonably concluded those were the only terms of the oral contract given Tai-Fu's refusal to sign the written document, Tai-Fu's failure to argue otherwise in the trial court forfeits the issue on appeal. (*Blankenship v. Allstate Ins. Co*. (2010) 186 Cal.App.4th 87, 105.)

Regarding the claim the oral contract was uncertain because it did not identify the transaction upon which to base the two percent calculation, assuming without deciding the issue was adequately preserved for appeal during Tai-Fu's closing argument, the contention lacks merit. "Even when the uncertainty of a written contract goes to '"the precise act which is to be done" [citation], extrinsic evidence is admissible to determine what the parties intended. [Citations.]' It is only when the extrinsic evidence fails to remove the ambiguity that specific performance must be refused.' [Citation.]" (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 819.) "Once extrinsic evidence is considered, the interpretation of the contract becomes a question of fact for the trier of fact. [Citation.]" (*Duncan v. McCaffrey Group, Inc.* (2011) 200 Cal.App.4th 346, 381.)

Such evidence was presented here, with the jury interpreting the oral agreement as requiring the two percent to be calculated from the sale to the Morongo

Indians and awarding $400,000. In light of that, we disagree with Tai-Fu that YK's closing argument giving alternatives from which to make the calculation shows the oral agreement was uncertain.

2. Cross-Appeals (G043760 & G043787)

a. Denial of Prejudgment Interest

Castleton and YK contend the court erred in summarily denying their motions for prejudgment interest. We agree with respect to Castleton but affirm the order denying prejudgment interest to YK.

The motions were based on Civil Code section 3287, subdivision (a) (all further statutory references are to this code unless otherwise stated), under which "the court has no discretion, but must award prejudgment interest upon request" and a proper showing. (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828.) A general prayer in the complaint is sufficient to support an award of prejudgment interest but if interest is not included in the jury's verdict, a separate request must be made before entry of judgment or, at the latest, as part of a timely motion for new trial based on inadequate damages. (*Id.* at pp. 829-830.) We review the denial of prejudgment interest under section 3287, subdivision (a) for legal error. (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th 340, 347.)

YK's motion sought prejudgment interest from March 2006, when it entered the two percent oral agreement with Tai-Fu. But prejudgment interest is inappropriate when the amount of damages must be judicially determined from conflicting evidence and cannot be determined from truthful information provided by the creditor to the debtor. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960.) In this case, YK gave the jury three options from which to calculate the two percent—the $15 million the majority and minority shareholders received from the sale of the partnership interests, the Overton Moore offers of $25/$26 million, or the $20 million sale by the

Cabazon Partners to the Morongo Indians—each of which would result in a different recovery. The jury's award of $400,000 shows it chose the third option. Because this was based on conflicting evidence and could not "be resolved except by verdict or judgment" (*ibid*.), the court did not err in denying YK's motion.

As for Castleton, its complaint contained a prayer for prejudgment interest, but the jury's verdict did not include it and Castleton did not make a separate request before judgment was entered. It argues its motion for prejudgment interest satisfied the requirement for a postjudgment request. Tai-Fu disagrees, asserting the motion was "ordinary" rather than a motion for new trial as required by *North Oakland*. We reject that contention.

Motions are determined, not by their labels, but by the nature of the relief they seek. (*Sole Energy Co. v. Petrominerals Corp*. (2005) 128 Cal.App.4th 187, 193.) A motion made after entry of judgment may be construed as one for new trial where it sufficiently identifies the grounds and bases on which it is made and otherwise meets the procedural requirements for a new trial motion. (*Id.* at p. 195 [construing motion for reconsideration as one for new trial where new trial motion procedures satisfied].)

Here, Tai-Fu had notice prejudgment interest would be sought because the judgment provides a space for an award of interest. Additionally, a request for prejudgment interest was made the day after notice of entry of judgment was served. Castleton filed a supporting declaration that same day and thereafter sought prejudgment interest by filing a noticed motion on April 15.

Tai-Fu argues the motion was untimely because it was not filed within 15 days of the court's March 23 service of notice of entry of judgment. (Code Civ. Proc., § 659, subd. (2).) But as it acknowledges, when one party files a timely notice of intent to move for new trial, as Tai-Fu did on April 7, 2010, the other parties have 15 days to also serve and file similar notices. (*Ibid*.) Castleton's motion was thus made within the timeframe prescribed for new trial motions and Tai-Fu received its due process right to a

hearing. These facts differentiate this case from *North Oakland*, which denied prejudgment interest due to the plaintiffs' "egregious conduct" in simply inserting the interest into a proposed order after postjudgment proceedings had concluded without notice to the other party in violation of its due process rights. (*North Oakland Medical Clinic v. Rogers*, *supra*, 65 Cal.App.4th at p. 831.)

Tai-Fu maintains Castleton did not follow the mandatory procedural steps for new trial motions such as filing a notice of intent to move for new trial. But it fails to explain how a new trial motion would differ from the one filed in this case other than in name. Castleton's notice of motion designated the grounds on which it was made and specified it would be based on the court records. (Code Civ. Proc., § 659.) It may thus be construed as a notice of intent to move for new trial, despite not being titled as such or specifically stating it was based on inadequate damages given the fact that was "'the nature of the relief sought.'" (*Sole Energy Co. v. Petrominerals Corp.*, *supra*, 128 Cal.App.4th at p. 193.) Additionally, the motion was timely and supported by an affidavit and a memorandum of points and authorities. (Code Civ. Proc., §§ 659, 659a.) Under these circumstances, we construe Castleton's motion for prejudgment interest as one for new trial. (See *Sole Energy Co. v. Petrominerals Corp.*, *supra*, 128 Cal.App.4th at p. 195.)

We are not persuaded by Tai-Fu's claim prejudgment interest was properly denied because the jury was never asked when the breach occurred. Section 3287, subdivision (a) mandates an award of prejudgment interest to every one "entitled to recover damages certain, or capable of being made certain by calculation" if the right to receive such damages vested on a particular day. This condition is satisfied when the parties dispute only whether liability exists but do not challenge how to compute damages. (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 729.) "Courts generally apply a liberal construction in determining whether a claim is certain, or liquidated. [Citation.] The test for determining certainty under section 3287[, subdivision (a)] is whether the defendant knew the amount of damages owed to the claimant or could have

computed that amount from reasonably available information. [Citation.]" (*Howard v. American Nat. Fire Ins. Co*. (2010) 187 Cal.App.4th 498, 535.)

In this case, the dispute with Castleton at trial centered on liability giving rise to damages, not the computation of damages. Tai-Fu had the ability to determine the exact amount of damages to be paid Castleton when Overton Moore made its second offer on March 16, 2006, because at that point a "'ready, willing and able" buyer had been produced, entitling Castleton to a commission. (*Steve Schmidt & Co. v. Berry*, *supra*, 183 Cal.App.3d at p. 1306.) Contrary to Castleton's claim, that had not been done at the time Overton Moore made its first offer on March 2, because that was a resubmission of an offer that expired in November 2005.

b. New Trial Order

Castleton proffers the alternative argument the court erred in vacating the jury's special verdict Castleton's contractual right to a commission was based on the Lin's sale or transfer of the property. We need not decide this issue given our affirmance of the judgment.

DISPOSITION

The order denying Castleton Real Estate & Development, Inc.'s motion for prejudgment interest is reversed and the matter is remanded to the trial court to determine the appropriate amount to which it is entitled in accordance with the views expressed in this opinion. The order denying YK America Group, Inc.'s motion for prejudgment interest is affirmed. In all other respects, the judgment is affirmed. Castleton Real Estate

& Development, Inc. shall recover its costs on appeal. The remaining parties shall bear their own costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.